No. 636

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

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BAX-BRO

Claim No. 28921.

IRVING K. BAXTER,
Claimant-Appellant-Petitioner,

vs.

THE STATE OF NEW YORK,
Defendant-Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

IRVING K. BAXTER,
Attorney and Petitioner,
O. & P. O. Address,
R. D. 2, Frankfort, N. Y.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1952

Supreme Court of the United States

IRVING K. BAXTER, Claimant-Appellant-Petitioner, vs. THE STATE OF NEW YORK, Defendant-Respondent.	Claim No. 28921.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Irving K. Baxter, a member of the Bar of this Court, respectfully prays for a review on writ of certiorari of the final decision herein by the Court of Appeals of the State of New York, a state court of last resort.

The decision complained of denied to petitioner the right to have the arbitrary and unlawful dismissal of his claim against the State reviewed and corrected.

A copy of the order, unlawfully denying permission to appeal, was served on petitioner by the Attorney General of the State by mail December 8, 1951.

The claim herein pleads causes of action for assault and battery, false arrest, false imprisonment and malicious prosecution by New York State Policemen at and near the City of Utica, N. Y. The alleged acts began on June 21, 1945, and ended on January 18, 1947. On January 30, 1947, a motion was made in the Court of Claims of the State of New York for leave to sue the State in an action for damages, based on the torts and misfeasance of its officers and employees in the course of their employment.

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Attached to the motion papers was the affidavit of Irving K. Baxter, verified January 30, 1947, and filed and served January 31, 1947. This affidavit stated, "The time when and place where such claim arose and the nature of the same," as required by Section 11 of the Court of Claims Act for "The notice of intention to file a claim." The Act provides that a claim must be filed within 90 days of its accrual, unless a notice of intention be served within that time, in which event the claim may be filed at any time within two years after its accrual.

The motion came on for hearing before Judge Lounsberry on February 17, 1947, who ruled that the claim was barred because "Where wrongful acts are continuous, a new cause of action accrues upon the commission of each new wrong * * * and the Statute of Limitations begins to run as to each tort upon its commission" (*Baxter v. State*, 189 Misc. 525); and on September 8, 1947, "Ordered, that the motion for permission to file a proposed claim be and the same is hereby denied" (R. 14).

An appeal was taken to the Appellate Division, Fourth Department, and it was argued January 6, 1948. The appellant admitted that permission to appeal was not necessary, and so was properly denied; but argued that the offense complained of was a continuing trespass which began June 21, 1945, and ended January 18, 1947; and that no item in this continuous chain of offenses was barred by the statute so long as the last item was not so barred.

At the close of appellant's argument, the State's attorney did not arise to reply. So the Presiding Judge said to him:

> "Q. Is he right? A. Yes, he is.
>
> "Q. You heard what he said. Do you agree with him? A. Yes, I do."

The State's attorney then arose and left the courtroom.

The Appellate Division affirmed the order, with this notation:

> "(The order denies claimant's motion for permission to file a claim against the State for assault and battery, false arrest, false imprisonment and malicious prosecution, pursuant to Section 10 of the Court of Claims Act.)"

It seemed advisable to have this oral admission recorded. So appellant made motions for rehearing and for leave to appeal, and annexed thereto his affidavit which stated the substance of his argument on appeal, and the State's admission of its correctness. No opposing affidavit was filed.

On April 8, 1948, appellant filed his claim, as a matter of right under the law. No objection was made to the filing for more than five months, and the State placed the claim on the trial calendar of the September Term of the Court of Claims, and moved it for trial on September 13, 1948. The claimant answered, "Ready for trial." Judge Lounsberry then announced that the trial would begin immediately after the call of the calendar. Claimant asked the Judge if he intended to preside. The Judge said he did. Claimant then filed an affidavit of prejudice against the Judge, based solely on the misstatements of fact and of law in the Judge's written opinion in the case (*Baxter v. State*, 189 Misc. 525).

Judge Gorman was called, and (after a conference with Judge Lounsberry) began to hear the case on September 14, 1948. While claimant was addressing the Court in opening, a State's attorney interrupted to move for dismissal of the claim "because of improper filing and that no notice of intention to file a claim * * * was ever filed" (final order dismissing claim, R. 13).

The claimant argued: "That the claim accrued on January 18, 1947, and that on January 31, 1947, the claimant moved this court for leave to sue the State of New York and attached to the motion papers his affidavit which stated the time when and the place where such claim arose and the nature of the same" (final order, R. 13, 14).

The Court asked for briefs.

The State's brief said:

> "The claim herein pleads causes of action for assault and battery, false arrest, false imprisonment and malicious prosecution. The alleged acts began on June 21, 1945, and ended January 18, 1947.
>
> "On the argument of the motion before the Court, the issue was settled in the following colloquy between the Court and the claimant:
>
> "'Mr. Baxter: I have right here the grounds on which the Appellate Division acted unanimously, and it held that my time to file did not begin until the 18th day of January, 1947.
>
> "'The Court: All right, I agree with you on that.
>
> "'Mr. Baxter: Within that time I made an application to file the claim, for permission to file the claim, and stated everything that the law required, and that is equivalent to the notice.
>
> "'The Court: Would you like to brief that point for me? That is the whole gist of this litigation'" (Sten. Min. 14).

The claimant filed a brief showing the provisions of the Court of Claims Act, Section 11, to be:

> "Filing, service and contents of claim or notice of intention. * * * The claim shall state the time when and place where such claim arose, the nature

> of the same, and the items of damage or injuries claimed to have been sustained and the total sum claimed. The notice of intention to file a claim shall set forth the same matters except that the items of damage or injury and the sum claimed need not be stated."

Claimant's brief also showed that his affidavit, filed and served January 31, 1947, exactly and fully complied with these requirements of the statute for "The notice of intention to file a claim." *Petrones v. State* was cited (170 Misc. 223). In the opinion by Ryan, J., the Court of Claims said:

> "The object of requiring * * * serving a copy on the Attorney General * * * is to place the State in a position to have an investigation of the claim against it made by the proper officials and the State's defense prepared. When that object is attained the Courts will hold that substantial compliance with the statute is sufficient. We quote from the opinion of Judge Andrews in *Sweeney v. City of New York* (225 N. Y. 271, 276):
>
> " 'The rule we adopt is that if a paper of the character required comes into his possession within the time limited by the statute, it is unimportant how the possession is acquired. The object of the statute is accomplished.' "

Thus Judge Gorman knew that the claim accrued January 18, 1947; that the affidavit filed and served on January 31, 1947, fully complied with the requirements of the statute for notice of intention to file a claim; that thereby the time to file a claim was extended to two years after it accrued, i. e., to January 18, 1949; and that the claim (filed and served April 8, 1948) was therefore timely, lawfully and properly filed. His order (filed

and served February 23, 1949) was therefore, arbitrary and unlawful.

On March 14, 1949, an appeal was taken from the order dismissing the claim to the Appellate Division, Fourth Department. The Judges who heard this appeal knew (from the argument before them of the first appeal, and the admission of its rightness in open court by the State's attorney) that the claim herein was lawfully, timely and properly filed. Their affirmance of the order dismissing the claim was, therefore, arbitrary, unlawful and a breach of their judicial honor and integrity. It violated that cornerstone of the common law, Article 40 of the Magna Carta, viz.:

> "40. To none will we sell, to none will we deny or delay right or justice."

On July 18, 1949, the petitioner moved directly in the Court of Appeals for leave to appeal to the Court of Appeals herein. The Court denied the motion October 13, 1949, without opinion. Shortly thereafter the Chief Judge of the Court of Appeals of the State of New York granted an interview to movant; and, in response to the question as to why the Court had denied the motion, the Chief Judge said, "Because the Court believed the other fellow, and not you." Movant stated that "the other fellow" claims were not verified and were false and misleading, while movant's claims were verified, supported by the record and admitted to be true. After some discussion, the Chief Judge advised movant to make a motion for rehearing, and stated that there was no time limit so that movant could take his time and do it as well as he could. The movant did so, and his motions were thrice denied without opinion.

On or about November 14, 1950, at the Court of Appeals Hall, movant talked with the Chief Judge over the phone, and asked why his motions for rehearing were

denied. The Chief Judge replied, "Because the Court did not credit your claims." All the claims submitted by movant were verified, admitted to be true in open court, and were supported by the record, as is shown by moving affidavits. Doubt as to their credibility is not tenable.

On or about February 12, 1951, claimant again moved for further reconsideration of his application for leave to appeal to the Court of Appeals, on the ground that the Court has overlooked the fact that movant's claims are matters of record that have been fully admitted in open court, and cannot be discredited. Yet on or about March 21, 1951, an order was entered denying this motion without opinion.

On or about October 5, 1951, in his moving affidavit, claimant charged that the incumbent Judges of the Court of Appeals are biased and prejudiced in favor of the State Troopers whose vicious acts and misdeeds are the basis of the claim herein; and asked the Governor of the State to supply the Court with fair and impartial Judges to hear this case. On or about December 8, 1951, movant received a letter from the Attorney General saying:

> "There is enclosed copy of order of the Court of Appeals dated November 21, 1951, denying motion for leave to appeal to that court in the above entitled matter."

The enclosed copy of the order said:

> "A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:
>
> "Ordered, that the said motion be and the same is denied."

On or about December 18, 1951, movant inquired of the Clerk of the Court of Appeals why the Court had acted in the case while its Judges were disqualified by the challenge for prejudice. He answered:

> "We were informed by an attorney that the Governor was not going to supply any other Judges to hear the case, so the Court denied the motion."

Movant said, "But that was unlawful, after the Judges had been challenged for prejudice."

The Clerk replied, "Yes, but the motion could not hang on forever, so the Court denied it."

The basis upon which it is contended that this Court has jurisdiction to review the decision in question is: That a State court of last resort has here decided questions of broad general interest and public importance in a way that denies right and justice, refuses due process of law, violates its judicial honor and integrity (in that while knowing the right it has chosen the wrong), and has continued to act judicially in the case after its Judges were challenged for bias and prejudice. Thus it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The questions presented are: Were the Appellate Division Judges, who heard the argument of the first appeal and the State's admission in open court of the rightness of the appeal, justified in reversing themselves a year later? Was the Court of Appeals justified in denying permission to appeal from such a decision?

Was it lawful for the State court of last resort to pretend to "not believe" and to "not credit" claims which were verified, uncontradicted, supported by the record and admitted to be true in open court?

Was it lawful for this State court of last resort, after being challenged for bias and prejudice, to again act officially in the case and deny leave to appeal?

The reasons relied on for the allowance of the writ, are: State Police seem to have superceded the law in our State, as is shown by the statement of Assistant Attorney General Barnell herein, i. e., "You can't beat the Troopers! All the officers and Judges will be against you, and they will not let you win" (R. 11).

The statement of Policeman Tobin herein on June 16, 1945, viz.: "All right, Mr. Fresh! If you won't plead guilty to a little charge of speeding, I'll give you something to make you wish you had. I'll get the Troopers after you, and they will take your driver's license away from you" (R. 10).

The prompt appearance of Trooper Greene, June 21, 1945, who demanded petitioner's driver's license, and upon being refused because the demand was unlawful, said, "I am the law!" He then assaulted, falsely arrested and maliciously prosecuted petitioner, and refused to answer on cross examination in proceedings to have claimant's license to drive revoked, and the Referee upheld him (R. 11). Claimant was taken before a Justice of the Peace and there made a statement. The trooper contradicted it. Claimant stated that he was an attorney and did not lie. The Justice of the Peace replied, "I don't know whether you are an attorney or not. Anyway, I would take the word of this trooper before yours any time." While testifying before this Justice of the Peace, the trooper admitted talking with Tobin about Baxter before making the arrest and again over the phone right after the arrest (R. 10).

If all our Courts refuse the protection of the law to American Citizens when unlawfully attacked by police, then must our citizens defend their rights with force and

arms, against uniformed and armed officers of the law, or else abandon them. How long could Free America then survive?

It is respectfully submitted that the Court of Appeals of the State of New York, in the instant case, "Has so far departed from the accepted and usual course of judicial proceedings," and "so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision" (Rule 38).

WHEREFORE, petitioner earnestly prays this most High and Honorable Court, to Review on Writ of Certiorari the arbitrary and unlawful final decision of the Court of Appeals of the State of New York, that the same may be corrected, the unholy power of State Police be broken, and the Light of Liberty and Justice again shine brightly upon this earth.

Dated, Utica, N. Y., February 25, 1952.

Very respectfully,

IRVING K. BAXTER,
Attorney and Petitioner,
O. & P. O. Address,
R. D. 4, Frankfort, N. Y.

FILED
MAY 19 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

IRVING K. BAXTER, Claimant-Appellant-Petitioner, vs. THE STATE OF NEW YORK, Defendant-Respondent.	Claim No. 28921.

Petition for Rehearing of the Petition for Writ of Certiorari, No. 636, October Term, 1951; in the Above Entitled Case.

To the Honorable, the Supreme Court of the United States:

The petition of Irving K. Baxter, a member of the Bar of this Court, respectfully prays for a rehearing of his petition for Writ of Certiorari in the above entitled case.

The grounds of this petition are that the Court of Appeals of the State of New York, a State Court of last resort, has here decided questions of broad general interest and public importance in a way that denies right and justice, refuses due process of law, violates its judicial honor and integrity (in that, while knowing the right, it does the wrong); and it has continued to act judicially in this case after its Judges were formally challenged for bias and prejudice. All of which is more fully set out in the printed record and petition herein on file with the Clerk of the U. S. Supreme Court, together with other charges against State Courts for breaches of judicial integrity in this case.

No answer to any of these charges, nor reply of any kind, has been filed, or served on the petitioner by any of the interested parties herein.

It is necessary that the writ of certiorari be granted herein, so that its denial may not be taken for approval or sanction by the U. S. Supreme Court of any of the wrongdoings formally charged against State Courts herein.

WHEREFORE, the petitioner earnestly prays this most Honorable Court to grant the writ of certiorari herein, that what of right ought to be done may be done; and the honor and integrity of our Courts may be maintained.

Dated, Utica, N. Y., May 12, 1952.

Very respectfully,

IRVING K. BAXTER,
Attorney and Petitioner,
O. & P. O. Address,
R. D. 2, Frankfort, N. Y.

Certificate Under Rule 33.

I hereby certify that this petition is presented in good faith and not for delay.

Dated, Utica, N. Y., May 12th, 1952.

IRVING K. BAXTER, Petitioner,
Attorney and Counselor,
R. D. 2, Frankfort, N. Y.

Three copies each mailed to:

THE GOVERNOR, THE ATTORNEY GENERAL and to THE CLERK OF THE COURT OF APPEALS OF THE STATE OF NEW YORK.